



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

July 25, 1994

Mr. Charles Karakashian, Jr.
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR94-399

Dear Mr. Karakashian:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 25321.

The Texas Department of Public Safety (the "department") has received two requests for information relating to the department's contract to purchase a digital imaging driver license system. The department received the first request with respect to this matter on March 11, 1994. In that request, NBS Imaging Systems, an unsuccessful competitor for the department's contract, sought the following information:

- 1) A dated edition of the catalogue and proposal that formed the basis for the decision to award the contract to Polaroid. This information should include all pricing detail and central production processing information.
- 2) All formal and informal evaluation documents created by the Texas evaluation committee--including any evaluator's notes--for both Polaroid and NBS Imaging Systems, Inc.
- 3) The video tapes of the Polaroid and NBS Phase I Benchmark Demonstration.
- 4) Polaroid Card Samples and any test certification from an independent testing authority.
- 5) The reference(s) contacted by the evaluation team to determine Polaroid's capabilities against the mandatory requirements of the Texas RFP.

In a letter dated March 21, 1994, you requested an open records decision of this office and claimed that Polaroid, the successful bidder on the contract, sought trade secret protection only for information responsive to item 1. In addition, you advised this office that the department did not object to release of the remaining information. The department received its second request with respect to this matter from LAU Technologies, another unsuccessful competitor for the department's digital imaging driver license system contract, on March 24, 1994. In that request, the requestor sought the following nine categories of information:

- (1) All written evaluations, handwritten notes by DPS evaluators, and internal memos and correspondence regarding potential vendors who were being considered for the DPS contract to purchase a new Digital Imaging Driver License System;
- (2) All reasons why any vendor was eliminated from consideration for the award of the DPS Digital Imaging Driver License System contract;
- (3) All reasons why the Polaroid Corporation was awarded the DPS Digital Imaging Driver License System;
- (4) All objective and subjective criteria, score sheets and other materials that DPS evaluators were provided at any stage of the evaluation process;
- (5) All internal memos, correspondence, phone memos and any other document that reflects communication with potential vendors that were being considered for the DPS Digital Imaging Driver License System;
- (6) All documents, correspondence, catalogues, responses to former RFP 405-4-20009-F, price sheets and any other document submitted by any potential vendor directly or indirectly to DPS related to the DPS Digital Imaging Driver License System;
- (7) Any and all documents related to DPS plans, goals and objectives and statistics showing its good faith efforts to award 30% of its contracts to Historically Underutilized Businesses;
- (8) Any and all internal documents, memos, correspondence, policy statements, and interpretive statements showing DPS' understanding of when the Catalogue Procurement Process is to be applied and how it operates. This request includes all documents that reflect DPS' understanding, if at all, that it is not necessarily

obligated to award its contracts to the lowest bidder, and that it may negotiate in private with any qualified vendor over the price or quality of the vendor's products or services outside the formal catalogue amendment process; and

(9) Any and all internal documents, memos, correspondence, policy statements, and interpretive statements showing why DPS made its decision to convert its purchase of the Digital Imaging Driver License System to the Catalogue Purchase Procedure.

In response to this request, you submitted a request for an open records determination by letter dated April 4, 1994. You asserted trade secret protection on behalf of Polaroid only for information responsive to item 6 above. In addition, you advised this office that the department did not object to release of the remaining information responsive to this request.

You advised us that you have contacted all the vendors who competed for the department's contract and that only Polaroid objected to releasing its proposal information. Pursuant to section 552.305 of the Government Code, we notified Polaroid and solicited a brief outlining its objections based on the section 552.110 exception to releasing information. Polaroid claims that sections 552.101 and 552.110 of the Government Code except portions of its catalog from required public disclosure.¹ Specifically, Polaroid seeks to protect section 5.3.0 (pages 2-6 to 2-9); section 6.4.1.7 (pages 2-53 to 2-56); sections 6.4.1.17 and 6.4.1.18 (pages 2-62 to 2-64); sections 6.9.1.5 and 6.9.2.1 (pages 2-92 to 2-96), and the drawings included in these pages, of which Figure 2-1 on page 2-6 is an example.

Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

¹We understand that the department used the new catalog system to procure the digital driver license system. *See generally* Acts 1993, 73d Leg., ch. 906, § 1.07 at 3816 (enacting V.T.C.S. art. 601b, § 3.081); Gen. Servs. Comm'n, 18 Tex. Reg. 6832 (1993) (codified at title 1, section 113.19, of the Texas Administrative Code). Under the newly enacted catalog purchase procedure, vendors submit a catalog that lists their products or services and the respective prices to, *inter alia*, state agencies such as the department, who may then order the products or services directly from the vendors. These catalogs are available to all state and other agencies that are located within various regions defined by the General Services Commission and that are subject to the Information Resources Management Act, Gov't Code ch. 2054 (formerly V.T.C.S. art. 4413(32j)), *see* V.T.C.S. art. 601b, § 3.081(b), but are not generally available to the public.

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management. [Emphasis added.]*

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept the private owner's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5.²

We have examined the information for which Polaroid seeks trade secret protection. We conclude that the respondent has made a prima facie case that this information constitutes trade secrets. Accordingly, the department must withhold from public disclosure under section 552.110 of the Government Code³ the following portions of Polaroid's catalog: section 5.3.0 (pages 2-6 to 2-9); section 6.4.1.7 (pages 2-53 to 2-

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

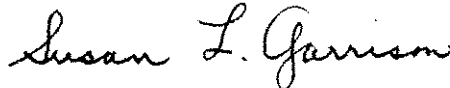
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2, 306 at 2 (1982); 255 (1980) at 2. When an agency or company fails to provide relevant information regarding factors necessary to make a 552.110 claim, a governmental body has no basis for withholding the information under section 552.110. *See* Open Records Decision No. 402 (1983) at 2.

³As we resolve this matter under the trade secrets aspect of section 552.110, we need not address the commercial or financial information aspect of section 552.110. *See* Open Records Decision No. 592 (1991) at 7.

56); sections 6.4.1.17 and 6.4.1.18 (pages 2-62 to 2-64); sections 6.9.1.5 and 6.9.2.1 (pages 2-92 to 2-96); and the drawings on these pages. The department, however, must release the remainder of the requested information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Open Government Section

SLG/GCK/rho

Ref.: ID# 25321

Enclosures: Submitted documents

cc: Mr. Nicholas J. Denice
General Manager
NBS Imaging Services, Inc.
1530 Progress Road
Fort Wayne, Indiana 46808
(w/o enclosures)

Mr. Kim E. Brightwell
Vinson & Elkins
600 Congress Avenue
Austin, Texas 78701-3200
(w/o enclosures)

Ms. Julie Thomas Cronin
Corporate Attorney
Polaroid Corporation
575 Technology Square
Cambridge, Massachusetts 02139
(w/o enclosures)